APPENDIX A

OPINION RENDERED: OCTOBER 2, 1981; 2:00 P.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

80-CA-1955-MR

ROBERT L. DURNING, JR., Trustee of the Estate of R. L. Durning, Deceased - - - *Appellant*

v.

CITY OF LOUISVILLE;

THE LOUISVILLE AND JEFFERSON COUNTY PLANNING COMMISSION; and

THE BOARD OF ALDERMEN OF THE CITY OF LOUISVILLE (Which Board now Consists of Aldermen Jim Allen; F. David Banks; Mike Carrell; E. Proter Hatcher, Jr.; Bill Heath; W. J. Hodge; Harold R. Howard; Steve Magre; Mary Margaret Mulvihill; Danny Ross; Allen M. Steinberg; and Sharon Wilbert) - - - *Appellees*

Appeal From Jefferson Circuit Court
Honorable Charles H. Anderson, Jr., Judge
Action No. 208281

AFFIRMING

BEFORE: GANT, GUDGEL, and HOWERTON, Judges.

HOWERTON, JUDGE. Durning appeals from a judgment of the Jefferson Circuit Court upholding the rezoning (downzoning) of his property from R-7 to R-5A. He argues that

the trial court erred by treating the rezoning as a legislative rather than as an adjudicative decision, that he was denied due process of law, that the rezoning was not supported by substantial evidence, and that the Planning Commission and Board of Aldermen failed to comply with the zoning statutes.

Each of the alleged errors is reviewable, although judicial review of zoning decisions is rather limited. *Fallon* v. *Baker*, Ky., 455 S.W. 2d 572 (1970). The issues are primarily considered to determine whether the action by the administrative or legislative body was arbitrary. *Id.*, at 574.

We have studied and considered the record and the arguments, and we find no arbitrariness or any reversible error. The applicant for the change was the Planning Commission. Document 66 in the record is the staff analysis of the situation, and it contains ample evidence to support the requirements of KRS 100.213 for a zoning change. Document 71 is the record of the hearing before the Planning Commission. It reveals that evidence was presented for and against the proposed change. Various supporting reports and documents were incorporated in the record. Durning's attorney opposed the change at that hearing. Although the hearing was conducted informally, it satisfied the requirements of an adjudicatory hearing and due process. *Fiscal Court* v. *Ogden*, Ky. App., 556 S.W. 2d 899 (1977). *See also, McKinstry* v. *Wells*, Ky. App., 548 S.W. 2d 169 (1977). The Planning Commission used a reasonably fair and complete fact-finding procedure in making its determinations. We find no failure to comply with the statutes.

The legislative body thereafter reviewed and adopted the findings and recommendations of the Commission and rezoned the property. It was not necessary for the Board of Aldermen to conduct a *de novo* adjudicative hearing in

order to approve the recommendation of the Commission. *City of Louisville* v. *McDonald*, Ky., 470 S.W. 2d 173 (1971).

We are in general agreement with the trial judge's opinion dated August 15, 1980. The essential facts are set forth therein. We adopt it as the opinion of this Court, and for reasons and conclusions expressed in that opinion and herein, we affirm the judgment of the Jefferson Circuit Court.

GANT, JUDGE, CONCURS.

GUDGEL, JUDGE, DISSENTS.

GUDGEL, JUDGE. DISSENTING. I respectfully dissent. In my opinion, the downzoning of appellant's property from R-7 to R-5A, at the request of the Planning Commission's staff, was both arbitrary and illegal.

KRS 100.213 prohibits the amendment of a zoning map unless the proposed amendment conforms with the community's comprehensive plan. The Commission found that the downzoning was in conformity with the comprehensive plan because it satisfied the principle of the plan that existing sound residential areas—neighborhoods—should be conserved, and deteriorated residential areas with redeeming qualities regenerated.

Specifically, the Commission found that the rezoning of appellant's property to a zoning classification that permits a maximum density more closely related to the existing residential density in the area promoted the conservation of the residential nature of the area. This finding by the Commission, in my opinion, is almost incredulous. The logic of it completely escapes me.

The rezoning of appellant's land does not conserve the residential character of the Crescent Hill area. The area was zoned residential before the rezoning and is still zoned

residential after the rezoning. How then could the Commission members legally find that the rezoning of appellant's land had the effect of promoting the conservation of the residential character of the area? The obvious answer is that they could not. In fact, the lowering of the permitted density in a residential area, as was accomplished here, operates to decrease the number of residential units available in a given area. Therefore, if anything, such a rezoning is in violation of the residential principle of the comprehensive plan since it does not help to conserve all available residential resources.

As a backup to its finding that the downzoning was in conformity with the comprehensive plan, the Commission found under KRS 100.213(1) that the original zoning of the property was inappropriate because it permitted high density residential development of a location not having direct or convenient access to a major street or highway in violation of a second principle of the comprehensive plan. This finding, like the Commission's first finding, is completely unsupported by the record. While appellant's property does not have direct access to a major street, it does have convenient access to such a street. This is clearly shown on the maps of the area which were before the Commission, and merely because that access happens to be through a single family residential area does not render the access inconvenient. Convenient access exists nevertheless.

The Commission also found under KRS 100.213(2) that there had been a major change of an economic, physical, or social nature within the area not contemplated by the comprehensive plan which had altered the basic character of the area. This finding is also completely unsupported by the record. According to the Commission, the change which altered the basic character of the area was the destruction caused by the April 3, 1974 tornado which struck Louis-

ville. However, the Commission's staff admitted at the hearing that the Post-Tornado Planning Report showed that the area was in relatively sound condition even though the area suffered extensive damage. In short, there was nothing before the Commission on which they could base a finding that the basic character of the area had been altered by the 1974 tornado damage. In fact, just the opposite is true, as most of the homes damaged have been rebuilt and restored.

The majority concludes that there was ample evidence to support a finding that the requirements of KRS 100.213 were met. I cannot agree that such is the case, as I am satisfied that there is no evidence to support a finding that the requirements of KRS 100.213 were met.

The effect of the downzoning in this case was to limit the number of residential units appellant may erect on his property to 51, although he originally had a right to erect 102. I believe that this downzoning of his property was accomplished illegally in violation of KRS 100.213. This is especially true in my view since the comprehensive plan designated appellant's property as part of an area which should be developed as a high density residential area.

Accordingly, I would reverse the judgment of the circuit court and remand this cause, with directions to enter a judgment declaring the downzoning of appellant's property to be arbitrary, illegal, and void.

Attorneys for Appellant:

GERALD KIRVEN
501 South 2nd Street
Louisville, KY 40202

KYLE T. HUBBARD
730 W. Main St.
Louisville, KY 40202

Attorney for Appellee, Board of Aldermen:

WALTER R. BUTT, III
Third Floor, City Hall
Louisville, KY 40202

Attorney for Appellee, City of Louisville:

JAMES P. GREEN
2nd Floor, City Hall
Louisville, Kentucky 40202

Attorneys for Appellee, Louisville & Jefferson Co. Planning Commission:

ALEX F. TALBOTT
ARTHUR DANIEL KELLY
900 Fiscal Court Building
Louisville, KY 40202

APPENDIX B

COURT OF APPEALS OF KENTUCKY

No. 80-CA-1955-MR

ROBERT L. DURNING, JR., Trustee of the Estate of R. L. DURNING, Deceased - - - *Appellant*

v.

CITY OF LOUISVILLE, Et Al. - - - - *Appellees*

Appeal From Jefferson Circuit Court
Honorable Charles H. Anderson, Jr., Judge
Action No. 208281

ORDER DENYING PETITION FOR REHEARING

BEFORE: GANT, GUDGEL and HOWERTON, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: April 9, 1982

(s) William M. Gant
Judge, Court of Appeals

APPENDIX C

SUPREME COURT OF KENTUCKY

82-SC-347-D
(80-CA-1955-MR)

ROBERT L. DURNING, JR., Trustee of the Estate of R. L. DURNING, Deceased - - - *Movant*

v.

CITY OF LOUISVILLE, Et Al. - - - *Respondents*

Jefferson Circuit Court
No. 208281

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of Robert L. Durning, Jr., Trustee of the Estate of R. L. Durning, Deceased for a review of the decision of the Court of Appeals is denied.

ENTERED June 29, 1982.

(s) John S. Palmore
Chief Justice

APPENDIX D

JEFFERSON CIRCUIT COURT

THIRD DIVISION

No. 206281

ROBERT L. DURNING, JR., Trustee of the Estate of R. L. DURNING, Deceased - - - *Plaintiff*

v.

CITY OF LOUISVILLE, Et Al. - - - - *Defendant*

JUDGMENT

Now, this case having been submitted to the Court on the basis of the record and briefs filed by counsel for the respective parties and the Court having thoroughly considered such record and briefs and having rendered its Opinion, Findings of Facts and Conclusions of Law,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Court's Opinion, Findings of Facts and Conclusions of Law dated August 15, 1980 are incorporated herein and made a part hereof.

2. The action of the plaintiff, Robert L. Durning, Jr., trustee, is hereby dismissed with prejudice at the cost of the plaintiff.

3. This judgment is final and there is no just reason for delay.

(s) Charles H. Anderson
Judge

Date: August 27, 1980

Tendered by:

(s) Alex F. Talbott
Attorney for Louisville & Jefferson
County Planning Commission

APPENDIX B

JEFFERSON CIRCUIT COURT

THIRD DIVISION

No. 206,281

ROBERT L. DURNING, JR., Trustee of the Estate of R. L. Durning, Deceased - - *Plaintiff*

v.

CITY OF LOUISVILLE, Et Al. - - - - *Defendant*

OPINION, FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This is an action by Plaintiff for an Injunction against the city of Louisville preventing the enforcement of Ordinance No. 128 Series 1975 which down-zoned Plaintiff's property from R-7 to R-5A.

The Plaintiff contends that the Ordinance changing the zoning of Plaintiff's property is unconstitutional because it was enacted in an arbitrary proceeding which denied Plaintiff his constitutional rights of due process of law.

The Defendant contends that the Ordinance was enacted according to law as a result of the April 1974 Tornado and is constitutionally valid.

The evidence clearly shows and the Court finds that the Defendant, City of Louisville, through its Board of Aldermen acting upon the recommendation of the Louisville & Jefferson County Planning Commission changed the zoning classification of Plaintiff's property from R-7 to R-5A. As a result, apartment development density permitted was reduced from a maximum of thirty-four dwelling units per acre to a maximum of twelve dwelling units per acre.

The record indicates that the Durning property in 1960 (the area in red on Document 1 and 2 under Admission B) was re-zoned by the Defendant, City of Louisville, to a C-Apartment classification which authorized up to thirty-four dwelling units per acre. After the adoption of the current zoning regulation the C-Apartment classification became R-7 apartment classification which also authorized up to thirty-four dwelling units per acre along with certain other uses. (Admission B Doc. 8 and 71) (Page 15 and 16 and D 2).

The Comprehensive Plan adopted by the City of Louisville in 1970 as required by KRS 100.183 designated the Durning property as high density of not less than thirteen dwelling units per acre (Adm. A, Exh. A attached to Complaint herein) (Spring Depo. Page 36-38, Adm. B. Doc 40 and 66).

The Tornado of 1974 damaged and destroyed improvements in certain parts of Jefferson County within the area of the Durning property shown in Doc. 1 Adm. B. Two houses were destroyed, two sustained major damages, including the residence of Mr. R. L. Durning, Sr., and approximately seventeen houses sustained roof damages that was repaired after the Tornado. A number of trees were downed on the unimproved Durning property which is the subject of this action (Adm. B Doc. 40 Page 42, Plat 9 Page 45, Plat 12 Doc. 71, Page 18019 Adm. D 10).

The record further indicates that shortly after the Tornado the Crescent Hill representatives of the Neighborhood Development Office wrote a Memorandum which states as follows (Adm. B. Doc. 15):

> "The City Law Dept., Neighborhood Development Office and Planning and Zoning and Building Department have already met and are working on a plan to preserve and improve, when possible, the integrity of

the Crescent Hill. These people have presented a plan to the Mayor and he in turn will present this plan to the people of Crescent Hill for their review.

The mayor thinks it is important that the City have input from Crescent Hill in order to act in a manner that would best serve the Crescent Hill area."

The Planning Commission's evaluation of the effected area was published in the "Post Tornado Planning Report". The Report evaluated the population growth and the demography of the affected area and the City in general, the existing land use pattern of the surrounding area including the zoning classification, the potential impact of any redevelopment of the area in light of the principles and goals of the community's Comprehensive Plan. (See Appendix 1 to Staff Report Page 11, Commission record)

The Findings of the Report were that the existing character of the land use which had developed was not compatible with the zoning which was authorized; that the residential neighborhood which had developed were sound and viable and that, therefore, the high density development which was permitted in the area by the existing zoning classification would be adverse to the best interest of the public welfare and contrary to the following principles of the Comprehensive Plan, to-wit:

"Existing sound residential area neighborhoods should be conserved and deteriorated residential areas with redeeming qualities should be regenerated."

Residential Planning principle No. 5, Louisville & Jefferson County Comprehensive Plan 1971.

The Planning Commission after reviewing the Report and upon a concurring recommendation from a site inspection committee which made several trips to the affected

area held a special public hearing on January 25, 1975, to review arguments for and against the proposed change in zoning. The Plaintiff here, as a property owner of a vacant lot zoned high density in one of the areas recommended for rezoning, was present at that meeting and his arguments against the zoning changes were presented by his attorney as indicated of record herein (Line 23 Page 47, Line 24 Page 59, Commission Record).

After the public hearing the Planning Commission was divided on the zoning issue and was unable to recommend approval or disapproval. The division continued through several subsequent meetings in which the issue was reconsidered.

On April 3, 1975, when the Mayor of the City of Louisville, a member of the Planning Commission pursuant to KRS 100.137 attended a regular scheduled Commission Meeting and voted in favor of recommending approval of the re-zoning. The proposal was then forwarded to the Board of Aldermen, the legislative body with final authority on proposed zoning amendments. The Aldermen unanimously voted to adopt City Ordinance 128 Series 1975 which affected the zoning change after making the following Findings:

> "Whereas the Board of Aldermen has considered the evidence of the public hearing held by the Planning Commission and the Recomendation of the Planning Commission and its staff and,
>
> Whereas the proposed change in zoning is in agreement with the Comprehensive Plan and,
>
> Whereas the original zoning classification given to this property was inappropriate and improper,
>
> Now, Therefore, be it ordained by the Board of Aldermen of the City of Louisville: that the herein

described property is hereby changed from R-7 Apartment to R-5A Residential."

The Court finds that the legislative standards which must be met in order to properly effect this type of change in zoning pursuant to KRS 100.213 have been established. Contrary to Plaintiff's argument our courts have held that the Comprehensive Plan serves as a guide rather than a straight jacket. See *Ward* v. *Knippenberg*, Ky. 416 S. W. 2d 746.

While the mapped portion of the Comprehensive Plan projected high density apartment development in this area the re-zoning has only adjusted the authorized zoning to a medium density apartment development. This does not appear to be a major deviation from the mapped portion of the Comprehensive Plan. Therefore, the Court finds that the legislative body correctly found that the zoning change was in agreement with the Community's Comprehensive Plan and the Board of Aldermen did not have to find that the existing zoning classification of the Plaintiff's property was completely inappropriate. KRS 100.213. However, it is noteworthy that the independent conclusion of the Post Tornado Planning Commission Site Inspection Committee found that the existing zoning was inappropriate in light of the above principles of the Comprehensive Plan.

Consequently, there was substantial evidence in support of the Board of Aldermen finding that the then existing zoning classification was inappropriate and improper. Accordingly, the Court finds that the down-zoning of Plaintiff's property was carried out in accordance with due process and is supported by sufficient evidence of a probative value.

This Court interprets the McDonald case to indicate that when re-zoning is a result of large scale studies and planning as indicated in the Firtts case that the changes are

legislative. That the accomplished change or re-zoning is legislative rather than adjudicative in nature. Consequently, a trial type hearing is not required. *Firtts* v. *City of Ashland*, Ky., 348 S. W. 2d 712 and *City of Louisville* v. *McDonald*, 470 S. W. 2d 173. In these cases the Court held that the Court would not and could not impose its independent judgment over that of the City's legislative body which has been constituted by statutory authority to make such a decision.

Our Courts long ago held that it was unconstitutional for the legislature to confer upon the judiciary the power to become directly involved in the zoning process by way of de novo trials and have somewhat limited the Courts review to the record as made at the legislative stage. See *American Beauty Home Corp.* v. *Louisville*, 379 S. W. 2d 450.

Plaintiff has offered an exhaustive indication of factual circumstances which could conclude that the down-zoning was the result of political influence or for personal gain in some form or another. However, this Court finds that the record does not support a finding of fraud or arbitrariness in accomplishing the re-zoning of Plaintiff's property.

Courts will not inquire into reasons motivating a legislative body's enactment of zoning ordinance and the cases indicate that the Court may only determine if the legislative body had authority to enact a zoning ordinance, whether it was enacted arbitrarily, whether it is unreasonable and whether it bears a reasonable relationship to the public health and welfare. See *Hamilton* v. *Ky. Distilleries and Warehouse Co.*, 551 U. S. 146, also *Clark* v. *City of Paducah*, 439 S. W. 2d 84.

Plaintiff has also presented a forceful argument on the issue of not receiving notice or being afforded an opportunity to be heard at all stages concerning the re-zoning of his property. However, the Court finds that the cases do not seem to indicate that it is absolutely necessary that one

who has property that is being re-zoned must receive absolute and complete notice of every proceeding in conjunction with the re-zoning of the property.

In the case of *Bellemande* v. *Priddle*, 503 S. W. 2d 734, the Court states that the opposing party was present by counsel (in this case the Plaintiff was represented by attorney Hubbard in the proceedings here and did appear at several of the proceedings in connection with the re-zoning of Plaintiff's property) who made comprehensive statements and furnished Exhibits to the Commission, the Commission members asked questions, cross-examined speaker and received answers although the witnesses who spoke were not sworn many stated reasons why they felt it was improper to grant the proposal. All were given a full opportunity to express themselves and to refute the contra[illegible]ion those who expressed contrary views. This procedure sufficiently constituted trial type hearings as referred to in the City of Louisville v. McDonald case, *supra*. It, therefore, seems to be well established that the legislative body is free to adopt the findings of the Planning Commission without holding an additional trial type hearing. See also *Fiscal Court of Jefferson County* v. *Stallings*, 515 S. W. 2d 234.

Therefore, the Court is of the opinion and finds that the Plaintiff's property was re-zoned from R-7 to R-5A reducing the density of multiple units permitted per acre according to the existing procedure and law of the Commonwealth of Kentucky. Consequently, Plaintiff's Complaint must be dismissed at his cost.

Counsel for Defendant shall tender a judgment accordingly.

Dated this 15th day of August, 1980.

(s) Charles H. Anderson
Judge

CC to: Mr. Gerald Kirven
Mr. Louis Cohen
Mr. Alex F. Talbott

APPENDIX F

MINUTES OF LOUISVILLE AND JEFFERSON COUNTY PLANNING COMMISSION

January 25, 1975

Docket No. 9-130-74

Subject: Proposed changes in the zoning of the Northeast Crescent Hill area.

Notice of this public hearing appeared in The Louisville Times on January 14, 1975, a notice of the hearing and a map of the area involved was posted on the property and notices and a map of the area involved were sent by registered mail to property owners and adjoining property owners as recorded in the Jefferson County Tax Office.

Since the Commission was the applicant, Charles Davis, Hearing Officer, gave a summary of the staff's report accompanied by a slide presentation. (The staff report in full and the script accompanying the slide presentation follow the resolution of this case.)

The following people spoke in favor of the requests:

Crough Venable, 166 North Peterson, Vice President of the Crescent Hill Community Council

Larry Wright, 2065 Sherwood Avenue, a member of the Bonnycastle Homestead Association

George Maiser, Jr., 110 Fenley Avenue, who asked a question and also spoke later in opposition.

The following people requested a change to R-4 single-family residential or requested that the study area be expanded.

Louise Diecks, 266 Claremont Avenue, who also submitted a letter from Thelma I. Kahlz, 265 Claremont

Edward Hoffman, Sr., 204 Fenley Avenue
George Maier, Jr., 110 Fenley Avenue
Wilba Roby, 215 Crescent Court

The following spoke in opposition:

Kyle Hubbard, 1615 Kentucky Home Life Building, who also submitted (1) sheet #13 of the Zoning District Map showing existing zoning by color code (2) a copy of the Comprehensive Plan (3) a copy of the corrections and amendments to the Comprehensive Plan (4) two color snapshots—one of the apartments existing in the area and one of nearby Baptist Seminary (5) six black and white photographs—two of the subject sites prior to the tornado and four of single family dwellings converted to apartments and duplexes (6) a 7" x 10" black and white photograph of Seminary Village taken from the Masonic Home property.

The Executive Director responded to various comments and questions.

A transcript of the public hearing is on file in this docket.

A motion to deny was made by Commissioner Gregory and seconded by Commissioner Pettyjohn.

The vote was as follows:

YES: Commissioners Gregory, Pettyjohn, Reeves and Wilbert

NO: Commissioners Wimsatt, Hackett, Phillips and Tully

The motion failed.

A motion to approve was made by Commissioner Hackett and seconded by Commissioner Tully.

The vote was as follows:

YES: Commissioners Wimsatt, Hackett, Phillips and Tully

NO: Commissioners Gregory, Pettyjohn, Reeves and Wilbert

The motion failed.

On a motion by Commissioner Pettyjohn, seconded by Commissioner Hackett, the following resolution was unanimously adopted:

RESOLVED, that the Louisville and Jefferson County Planning Commission does hereby DENY action on this case.

APPENDIX G

MINUTES OF LOUISVILLE AND JEFFERSON COUNTY PLANNING COMMISSION

March 6, 1975

Docket No. 9-130-74

Subject: Crescent Hill Northeast

The public hearing on this request was held January 25, 1975, at which time action was deferred since a final decision could not be agreed upon.

A motion to deny the rezoning was made by Commissioner Gregory and seconded by Commissioner Reeves.

The vote was as follows:

YES: Commissioners Pettyjohn, Gregory, Reeves and Wilbert

NO: Commissioners Wimsatt, Hackett, Phillips and Tully

The motion failed.

A motion to approve was made by Commissioner Phillips and seconded by Commissioner Hackett.

The vote was as follows:

YES: Commissioners Wimsatt, Hackett, Phillips and Tully

NO: Commissioners Pettyjohn, Gregory, Reeves and Wilbert

The motion failed.

After a discussion on a motion by Commissioner Pettyjohn, seconded by Commissioner Wilbert, the following resolution was unanimously adopted:

> RESOLVED, that the Louisville and Jefferson County Planning Commission does hereby DEFER action on this case.

APPENDIX H

MINUTES OF LOUISVILLE AND JEFFERSON COUNTY PLANNING COMMISSION

March 20, 1975

Docket No. 9-130-74

Subject: Crescent Hill Northeast

The public hearing on this request was held January 25, 1975, at which time action was deferred since a final decision could not be agreed upon. The request was again considered March 6, 1975 and again no final action was taken.

In executive session this date the attached letter from Kyle Hubbard, Attorney representing on opposing property owner, was read by Commissioner Pettyjohn.

A motion to deny the rezoning was made by Commissioner Gregory and seconded by Commissioner Reeves.

The vote was as follows:

YES: Commissioners Pettyjohn, Gregory, Reeves and Wilbert

NO: Commissioners Wimsatt, Hackett, Phillips and Tully

The motion failed.

A motion to approve was made by Commissioner Phillips and seconded by Commissioner Hackett.

The vote was as follows:

YES: Commissioners Wimsatt, Hackett, Phillips and Tully

NO: Commissioners Pettyjohn, Gregory, Reeves and Wilbert

The motion failed.

After a discussion, on a motion by Commissioner Gregory, seconded by Commissioner Phillips, the following resolution was adopted:

> RESOLVED, that the Louisville and Jefferson County Planning Commission does hereby POSTPONE this case indefinitely.

The vote was as follows:

YES: Commissioners Gregory, Hackett, Phillips, Reeves, Tully and Wilbert

NO: Commissioners Wimsatt and Pettyjohn

The motion carried.

The Executive Director stated that such action could not remove the zoning case because of the Commission's responsibility under KRS 100.

A discussion on the effect of the action to postpone indefinitely followed and the matter was unanimously referred to counsel for his advice.

APPENDIX I

MINUTES AND RESOLUTION OF LOUISVILLE AND JEFFERSON COUNTY PLANNING COMMISSION

April 3, 1975

Docket No. 9-130-74

Subject: Crescent Hill Northeast

The public hearing on this request was held January 25, 1975 and action was deferred since a decision could not be agreed upon. The request was reconsidered by the Commission March 6 and 20, 1975 with notes of approval and denial ending in a tie.

Mayor Sloane arrived at the executive session in time for discussion of this case. A copy of the entire docket file had been given to the Mayor prior to today's meeting at his request.

The Executive Director spoke in response to questions from the Mayor on the alleged non-conformance of this down-zoning with the Comprehensive Plan Map.

Commissioners Gregory, Tully, Pettyjohn, Reeves and Wilbett explained their reasons for support or for disapproval of the request.

The Site Inspection Committee had revisited the site March 26, 1975.

Kyle Hubbard, Attorney, representing the property owner, 1614 Kentucky Home Life Building, requested that he be allowed to question Mayor Sloane about this case. (A transcript of that questioning is on file in this docket.)

On a motion by Commissioner Phillips, seconded by Commissioner Wilbert, the following resolution was adopted:

WHEREAS, the Commission finds that the proposed change is in conformance with the Comprehensive Plan planning principle which state:

"Existing Sound Residential Areas—Neighborhoods—Should be Conserved, and Deteriorated Residential Areas With Redeeming Qualities Should be Regenerated," and

WHEREAS, the Commission finds that the present zoning is in conflict with the Comprehensive Plan principle which states:

"High Density Development Should Occur in Locations With Immediate or Convenient Access Both to Major Streets and Highways and to Shopping and Public Facilities," and

WHEREAS, the Commission finds that the present zoning is inappropriate and improper because it permits development at a greater density than that which presently exists in the subject neighborhood which should be conserved due to its sound condition, and

WHEREAS, the Commission finds that the destruction caused by the April 3, 1974 tornado constitutes a major change of an economic, physical and social nature within the area involved which was not anticipated in the Community's Comprehensive Plan and which has substantially altered the basic character of the area, and

WHEREAS, the Commission finds that adoption of the proposed zoning change would promote redevelopment of the tornado damaged area in conformance with the Comprehensive Plan

NOW, THEREFORE, BE IT RESOLVED, that the Louisville and Jefferson County Planning Commission does

hereby recommend to the Board of Aldermen of the City of Louisville, that the proposed amendment to the Zoning District Map of Jefferson County, Kentucky, from *R-7 Apartment to R-5A Residential-Apartment* on the following described property be APPROVED.

The vote was as follows:

YES: Commissioners Hackett, Phillips, Sloane, Tully and Wilbert

NO: Commissioners, Wimsatt, Pettyjohn, Gregory and Reeves

The motion carried.

BEGINNING at a point in the intersection of the Southwest line of Fenley Avenue and the Southeast line of a twenty-foot alley adjacent to the property of the Louisville Water Company, thence Southeastwardly with the said Southwest line of Fenley Avenue 625 feet, more or less, to the Intersection of the Northwest line of Blackburn Road; thence at a right angle to Fenley Avenue, Southwest 200 feet; thence at a right angle, Northwest 625 feet, more or less, to the aforesaid Southeast line of the twenty-foot alley; thence Northeast 200 feet to the point of beginning. Being all the property fronting on the Southwest side of Fenley Avenue from the Southeast line of the property of the Louisville Water Company to the Northwest line of Blackburn Road.

APPENDIX J

BOARD OF ALDERMEN OF THE CITY OF LOUISVILLE MINUTES

Regular Meeting of the Board of Aldermen
Tuesday, October 14, 1975, at 7:00 P.M.

A Regular Meeting of the Board of Aldermen of the City of Louisville was called to order by President William B. Stansbury at 7 p.m. on Tuesday, October 14, 1975, in the Aldermanic Chambers of the City Hall in Louisville, Kentucky.

Upon a Roll Call, those Present and Absent were as follows:

	Present	Absent
President	Stansbury	
Aldermen	Mershon	
	Bendl	
	Gentry	
	Heuser	
	Kotheimer	
	Lawrence	
	Meyer	
	Bronger	
	Bibb	
	Brown	
	Morris	

President Stansbury called for the Reading of the Minutes. Upon a motion duly made by Aldermen Bronger, seconded by Alderman Mershon, a vote was taken and the Minutes of both the Regular Meeting on September 23, 1975, and the Special Meeting on September 30, 1975, were approved unanimously as published.

. . . .

Alderman Lawrence, next reported favorably on the following two Ordinances and recommended that they be passed. Each Ordinance was read in turn and seconded.

An ordinance to change the zoning from R-7 Apartment to R-5A Residential Apartment in the Northeast Crescent Hill area. (D.N. 9-130-74)

An ordinance to change the zoning from R-5 Residential to C-1 Commercial on the Northeast side of Bardstown Road 498 feet more or less southeast of Goldsmith Lane, fronting on Bardstown Road 191 feet and extending northeast to a depth of 300 feet. (D.N. 9-51-75)

A Roll Call Vote was taken on each and the results are as follows:

AYES: Pres. Stansbury; Ald. Mershon, Bendl, Gentry, Heuser, Kotheimer, Lawrence, Meyer, Bronger, Bibb, Brown, Morris.

Each of the above Ordinances passed with 12 Affirmative Votes, those members present and voting.

. . . .

APPENDIX K

CITY OF LOUISVILLE ORDINANCE No. 128 SERIES 1975

An Ordinance to Change the Zoning From R-7 Apartment to R-5A Residential Apartment in the Northeast Crescent Hill Area. (Docket No. 9-130-74)

WHEREAS, the Board of Aldermen has considered the evidence of the public hearing held by the Planning Commission and the recommendations of the Planning Commission and its staff, and

WHEREAS, the proposed change in zoning is in agreement with the Comprehensive Plan, and

WHEREAS, the original zoning classification given to this property was inappropriate and improper, Now, THEREFORE,

BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF LOUISVILLE:

Section 1. That the herein described property as shown on the District Map accompanying and made a part of Zoning Ordinance No. 66, Series 1971, be and the same is hereby changed from R-7 Apartment to R-5A Residential Apartment as shown by plat attached hereto. Said property is in the City of Louisville and is described as follows:

BEGINNING at a point in the intersection of the Southwest line of Fenley Avenue and the Southeast line of a twenty-foot alley adjacent to the property of the Louisville Water Company; thence Southeastwardly with the said Southwest line of Fenley Avenue 625 feet, more or less, to the intersection of the Northwest line of Blackburn Road; thence at a right angle to Fenley Avenue, Southwest 200 feet; thence at a right angle,

Northwest 625 feet, more or less, to the aforesaid Southeast line of the twenty-foot alley; thence Northeast 200 feet to the point of beginning. Being all the property fronting on the Southwest side of Fenley Avenue from the Southeast line of the property of the Louisville Water Company to the Northwest line of Blackburn Road.

Section 2. This Ordinance shall take effect upon its passage and approval.

(s) Edna A. Givens, C.B.A.

(s) William B. Stansbury, P.B.A.

Effective without the signature of the Mayor: Oct. 28, 1975

_____Mayor

APPENDIX L

COURT OF APPEALS OF KENTUCKY

80-CA-1955-MR

(Jefferson Circuit Court No. 208281)

ROBERT L. DURNING, JR., Trustee, Etc., - *Appellant*

v.

CITY OF LOUISVILLE, Et Al. - - - - *Appellees*

NOTICE OF APPEAL—Filed September 7, 1982

Notice is hereby given that the above-named appellant, Robert L. Durning, Jr., Trustee of the Estate of R. L. Durning, deceased, hereby appeals to the Supreme Court of the United States from the opinion and judgment of the Kentucky Court of Appeals entered in this action on October 2, 1981, affirming the trial court judgment, and also the order of the Kentucky Court of Appeals denying a rehearing, entered in this action on April 9, 1982. (The Kentucky Supreme Court denied appellant's motion for discretionary review on June 29, 1982.)

This appeal is taken pursuant to 28 U. S. C. §1257(2).

Dated: September 7, 1982

/s/ Gerald Kirven
Gerald Kirven
501 South Second Street
Louisville, Kentucky 40202
(502) 584-7722
Attorney for Appellant

APPENDIX M

ADDITIONAL PORTIONS OF RECORD RAISING FEDERAL QUESTIONS SOUGHT TO BE REVIEWED

Proposed Findings of Fact and Conclusions of Law tendered to the trial court by the appellant on March 9, 1979, state in pertinent part:

". . . The plaintiff . . . has alleged in substance that the downzoning ordinance is void because it is unconstitutional, having been enacted by means of a procedure that was arbitrary and denied the property owners due process and equal protection of the laws." (p. 1)

". . . the action of the defendants in downzoning the Durning property violated the provisions of Section 1, Amendment XIV of the Constitution of the United States, which provides in pertinent part:

> "'. . . nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'" (p. 44)

"The Court notes that the plaintiff had pleaded and proved that the downzoning of the Durning property was discriminatory and a violation of the equal protection clause of the Federal Constitution because the R-7 zoned property of Seminary Village (on the same street as the Durning property) could have been downzoned to R-5A, but was not. . . . Also, a small tract at 115 Blackburn Avenue — 1100 feet from the Durning property — could have been downzoned from R-6 to R-5A, but was not. . . . The Supreme Court of the United States has said:

> "'Everyone has a right to demand that he be governed by general rules, and a special statute which, without

his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow." This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.' " Cotting v. Godard, 183 U. S. 79, 109 (1901). . . . (pp. 54-55)

"Counsel for the plaintiff is directed to tender a judgment . . . holding invalid Ordinance No. 128, Series 1975. . . ." (p. 55)

The Brief for Plaintiff (R 501-509) filed in the trial court on March 9, 1979, adopts the plaintiff's tendered findings and conclusions (R. 501) and concludes:

". . . the downzoning ordinance enacted by the City of Louisville in connection with the Durning property is an unconstitutional nullity, and this Court should so hold." (R 509)

The opinion of the trial court states in part (R 627):

"The Plaintiff contends that the Ordinance changing the zoning of Plaintiff's property is unconstitutional because it was enacted in an arbitrary proceeding which denied Plaintiff his constitutional rights of due process of law."

Appellant's Brief in the Kentucky Court of Appeals states in part (p. 16):

"THE DOWNZONING IS STATE ACTION WHICH DEPRIVED APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED HIM

THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT, SECTION 1, OF THE UNITED STATES CONSTITUTION . . ."

The Appellant's brief contains four subsections with the following headings:

"A. The Downzoning Denied Appellant Procedural Due Process." (p. 16)

"B. There Was Neither Fairness Nor Even the Appearance of Fairness In The Procedures Which Resulted In Downzoning The Durning Property." (p. 18)

"C. The Downzoning Denied Appellant Substantive Due Process." (p. 19)

"D. The Downzoning Denied Appellant the Equal Protection of the Laws." (p. 20)

The appellant's brief concludes (p. 24):

"The Court should reverse the judgment . . . and remand the case . . . with directions to enter judgment declaring void City of Louisville Ordinance #128, Series 1975, downzoning the Durning property."

Appellant's Motion For Discretionary Review to the Kentucky Supreme Court states the following among "The Questions of Law Involved" (p. 17):

"F. Were the procedures by which the downzoning was accomplished state actions depriving Mr. Durning of property, without due process of law, and denying him the equal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution . . . ?"